ADHD CHECKLIST FOR IDENTIFICATION UNDER THE IDEA AND SECTION 504/ADA*

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The prevalence of students with attention deficit hyperactivity disorder (ADHD) is on the rise. First, according to the Centers for Disease Control, the number of children ages 4-17 with a diagnosis of ADHD has increased 41% since ten years ago.[1] Second, the criteria for ADHD in the recently issued fifth edition of the Diagnostic and Statistical Manual of Mental Disorders have changed the initial age from 7 to 12, thus having the potential of more adolescents as well as adults qualifying for this diagnosis.[2]

This checklist[3] provides a systematic synthesis of the court decisions concerning eligibility of students ADHD under the Disabilities Education Act (IDEA) and Section 504 (§ 504).[4] The organizing framework under each of these federal laws consists of the three overlapping stages of

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[1] Alan Schwartz & Sarah Cohen, *A.D.H.D. Seen in 11% of U.S. Children as Diagnoses Rise,* N.Y. TIMES, MAR. 31, 2013, at http://www.nytimes.com/2013/04/01/health/more-diagnoses-of-hyperactivity-causing-concern.html?pagewanted=all&_r=0. A supplement to the CDC report concluded that ADHD is the most common mental disorder among children aged 3–17. Brenda Goodman, *1 in 5 Kids Has a Mental Disorder: CDC*, HEALTH DAY (May 16, 2013), at http://http://consumer.healthday.com/Article.asp?AID=676488

[2] See, e.g., Christina A. Samuels, *Disability Definitions Undergo Revisions in Psychiatric Guide*, EDUC. WK., June 5, 2013, at 7.

[3] For an early version that provided the basic framework but was limited to the regulations and agency interpretations, see Perry A. Zirkel, *A Checklist for Determining Legal Eligibility of ADD/ADHD Students*, *in* ADHD IN THE SCHOOLS: ASSESSMENT AND INTERVENTION STRATEGIES 94 (George J. DuPaul & Gary Stoner, eds. 1994).

[4] § 504 in this context serves as a shorthand reference for not only Section 504 of the Rehabilitation Act and its U.S. Department of Education regulations, but also the Americans with Disabilities Act (ADA) and its regulations. The reason is that this pair of laws have an identical definition of disability, with the ADA playing only a secondary role because it does not have provisions specific to public schools. Given its concurrent eligibility definition, however, the ADA extends the coverage of this document beyond public schools to private schools that are not recipients of federal financial assistance. Conversely, the coverage of this checklist does not extend to OCR letters of findings (LOFs) and hearing officer decisions. For a comprehensive two-volume reference, which extends to the ADA and also includes OCR LOFs and hearing officer decisions, see PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (2011) (available, with annual supplements, from LRP Publications). For an example of an LOF where OCR found a violation for not evaluating a child with ADHD for Section 504 eligibility according to current standards, see Virginia Beach (VA) City Pub. Sch., 54 IDELR ¶ 202 (OCR 2009).

identification: 1) child find, 2) evaluation, and 3) eligibility.[5] The source material is largely limited to court decisions,[6] with references to the regulations and agency interpretations—the Office of Special Education Programs (OSEP) for the IDEA and the Office for Civil Rights (OCR) for § 504—only serving the secondary purposes of underpinning the framework and filling selected gaps.[7] Each item of the checklist is presented in the form of a yes-no question. The font size of the "X" entry in for each item approximates the weight of case law directly supporting the YES and NO answers, as cited in the respective accompanying endnotes.[8]

The practical uses of the checklist include 1) having a systematic decisional framework for determining legal eligibility of students with ADHD, 2) readily accessing the court decisions interpreting each of the respective criteria, and 3) sorting out the sources of evidence that courts consider to be decisional factors. The major findings and conclusions are as follows:

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[5] For an annotated outline of the case law in these various stages across the various IDEA classifications, see Perry A. Zirkel, *The Law of Evaluations under the IDEA*, __ EDUC. L REP. __ (forthcoming 2013).

[6] Although refined, supplemented, and updated for the special purpose of this identification checklist, the primary source of the court decisions was Stacy D. Martin & Perry A. Zirkel, *Identification Disputes for Students with Attention Deficit Hyperactivity Disorder: An Analysis of the Case Law*, 40 SCH. PSYCH. REV. 405 (2011). The coverage does not extend to court decisions where the court identified but opted not to address the issue of eligibility under the IDEA or § 504. See, e.g., Zachary M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist., 829 F. Supp. 2d 649 (N.D. Ill. 2011) (ruling that student's eligibility under § 504 need not be decided in light of the case's resolution on various other grounds).

[7] For a longitudinal summary of the agency rulings specific to students with ADHD, see Perry A. Zirkel & George J. DuPaul, *Educational Policy*, *in* ATTENTION DEFICIT HYPERACTIVITY DISORDER: CONCEPTS, CONTROVERSIES, AND NEW DIRECTIONS 341 (KEITH Burnett & Linda Pfiffner, eds. 2008). Although the Joint Policy Memorandum in 1991 was a notable landmark, the crystallized legal starting point for the case law was the express addition of ADHD in the illustrative list, along with the accompanying clarification of the meaning of "limited alertness," in the 1999 regulations' definition of other health impairment (OHI).

[8] The entries, represented by three successive sizes of an "X," are only a tentative approximation on a national basis, with successively higher weightings for unofficially published federal district court decisions, officially published federal district court decisions, unofficially published federal appellate decisions, and officially published federal appeals court decisions. The intervening variables include not only the interpretation of the court's opinion, especially given the overlap of the categories and the frequent presence of additional diagnoses, but also—and most significantly for a particular setting—the jurisdictional fit of the cited case law.

- Child find, evaluation, and eligibility interact and overlap in varying ways, showing neither the legislation/regulations nor the court decisions have agreed on bright-line boundaries.[9]
- In the majority of cases, the student had other diagnoses in addition to ADHD.[10]
- Most of the court decisions focus on subsequent essential elements of eligibility rather than whether the diagnosis of ADHD is credible.[11]
- A diagnosis of ADHD does not suffice for identification under the IDEA; indeed, the majority of IDEA child find and eligibility rulings have been adverse to the plaintiff-parents.[12]
- Although the IDEA classifications at issue were not limited to OHI,[13] the primary decisional criterion for both the child find and eligibility cases was neither the ADHD diagnosis nor the IDEA classification criteria but rather the need for special education[14]; yet, the judicial basis for this determination varied rather widely, with grades, standardized

[9] The ultimate issue of free appropriate public education (FAPE) also sometimes plays a role in resolving one of more of these three preceding issues. See, e.g., W. Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417 (E.D. Pa. 2002) (using the definition of FAPE as a way of determining eligibility); D.B. v. Bedford Cnty. Sch. Bd., 708 F. Supp. 2d 564 (W.D. Va. 2010) (failing to evaluate SLD distinct from other classifications amounted to denial of FAPE).

[10] For an exploration of the identification and role of co-morbid diagnoses, see Martin & Zirkel, *supra* note 6, at 413-14.

[11] In examining the battle of experts between the parents' clinical psychologist and the district's school psychologist, one court concluded: "there is no "magic formula" for diagnosing ADD in adolescents." Richland Sch. Dist. v. Thomas P., 32 IDELR ¶ 233 (W.D. Wis. 2000).

[12] The prior study found relatively equal frequencies of judicial outcomes for eligibility, but it counted the court decisions without differentiated weighting in terms of precedential value. *Id*. at 410.

[13] Although OHI was the predominant classification, the most frequent alternatives—as in Martin & Zirkel, *supra* note 6—were, to a roughly equal extent, SLD and ED.

[14] Although some scholars and courts treat the regulatory requirements for "adversely affect" and "educational performance" as separate criteria, the reference herein to the need for special education is a broad-based rubric that includes them.

test scores, general education interventions, and expert—including teacher—opinion being the most frequent considerations.[15]

- The relevant case law specific to the various IDEA requirements for evaluation was relatively superficial in its level of scrutiny.[16]
- One of the key intervening factors, typical of litigation more generally,[17] was the judge's perspective.[18]
- A diagnosis of ADHD does not suffice for identification under § 504; although the case law is limited and the ADAAA has made pertinent expansions, the knee-jerk use of a 504 plan as a consolation prize for not qualifying for an IDEA IEP is still clearly questionable.[19]
- The key considerations under § 504, in the context of ADHD, are the identification of the directly limited major life activity—e.g., learning or concentration—and, even more importantly, the determination of "substantially" according to current interpretive standards, which include discounting the ameliorative effects of mitigating measures.[20]

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[15] As seen in the parentheticals listed after the cited court decisions in the checklist endnotes, the wide variance applied to not only the combination but also interpretation of these factors. As these parentheticals also show, in some cases a 504 plan was a factor in deciding the child find or eligibility issue.

[16] This characteristic, which has limited exceptions and which contrasts with professional concerns, comports with the trend in evaluation case law more generally. See, e.g., Zirkel, *supra* note 5.

[17] In addition to those specified *supra* note 8, other intervening factors applicable to litigation more generally included not only the factual contours of the case, the effectiveness of the parties' attorneys.

[18] *Compare* Austin Indep. Sch. Dist. v. Robert M., 168 F. Supp. 2d 635 (W.D. Tex. 2001), *aff'd mem.*, 54 F. App'x 413 (5th Cir. 2002) (excoriating the parents for spoiling their bright lazy child), *with* W. Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417 (E.D. Pa. 2002) (predicating eligibility on the child's high potential and parents' extensive assistance).

[19] The expansion of illustrative major life activities to include concentration and the reversed role of mitigating measures, such as medication, in the determination of substantially merit revised consideration, but the retention of the average peer in the general population means that the lack of a need for special education in a not inconsiderable number of the cases will mean that the child is not entitled to either IDEA or § 504 eligibility, with general education interventions being the legally defensible answer. The key in any event is an individualized, rather than automatic, determination based on the revised § 504 disability standards.

[20] In addition to the revised standards under the ADA amendments, which went into effect on Jan. 1, 2009, the continuing standard of the average person, or most people, in the general population merits careful application. The pertinent case law to date has been notably limited, but more litigation is likely.

UNDER THE IDEA		
	YES	**NO**
A. CHILD FIND[1]		
1) Reason to suspect both C1 and C2 below?	X[2]	X[3]
2) If YES for A1, initiating evaluation within reasonable period?		x[4]
B. EVALUATION[5]		
1) Appropriate? - e.g., various sources (including standardized tests, grades, behavioral data, parental information, and any IEEs[6])[7] - e.g., all areas of suspected disability[8]	X[9]	X[10]
C. ELIGIBILITY[11]		
1) Preponderant evidence of meeting the criteria of an IDEA classification:		
a) other health impairment (OHI) - a chronic or acute health problem resulting in limited … alertness[12]—i.e., credible diagnosis of ADHD[13]? • *if state law or district policy/practice requires a physician to make this diagnosis, the obligation is on the district, not the parent*[14] • *in any event, the district may not condition the evaluation (or services) on medication of the child*[15]		
-- OR --		
b) specific learning disability (SLD)[16] - basic psychological processing disorder—i.e., credible diagnosis of ADHD? - severe discrepancy or RTI criteria?[17]	x[18]	x[19]
-- OR --		
c) another IDEA classification—e.g., emotional disturbance (ED)[20]	x[21]	x[22]
2) If YES for C1a, C 1b, or C 1c, does this classification adversely affect the child's educational performance to the extent of necessitating special education?[23]	X[24]	X[25]

UNDER SECTION 504		
	YES	**NO**
A. CHILD FIND[26]		
1) Reason to suspect C1 thru C3 below?	x[27]	
B. EVALUATION[28]		
C. ELIGIBILITY[29]		
1) Preponderant evidence of meeting these three criteria:		
a) mental or physical impairment—i.e., credible diagnosis of ADHD?[30]		
-- AND --		
b) limiting a major life activity – expanded under the ADAAA (effective 1/1/09)[31] - e.g., learning - e.g., concentration - other: social interaction[32] behavioral control?[33]		
-- AND --		
c) substantially – similarly liberalized under the ADAAA - still, compared to the average student in the general population - but, without the effects of mitigating measures, e.g., medication		[X][34]

Endnotes

[1] 34 C.F.R. §§ 300.111(a) (collective—obligation to identify, locate, and evaluate "all children with disabilities in the State … who are in need of special education and related services") and 300.111(c) (individual—including "[c]hildren who are suspected of being a child with a disability … and in need of special education, even though they are advancing from grade to grade").

[2] El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918 (W.D. Tex. 2008) (NCLB test scores and continuing academic difficulties despite 504 plan); Scarsdale Union Free Sch. Dist. v. R.C., 60 IDELR ¶ 195 (S.D.N.Y. 2013) (parental request, which requires evaluation under state law); Jackson v. Nw. Local Sch. Dist., 55 IDELR ¶ 71, *adopted*, 55 IDELR ¶ 104 (S.D. Ohio 2010) (second of two points in time: teacher assistance team referral to outside mental health agency); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008) (not excessive absences but subsequent diagnosis of ADHD for OHI and psychiatric hospitalization for ED); Scott v. Dist. of Columbia, 45 IDELR ¶ 160 (D.D.C. 2006) (diagnosis of ADHD plus behavioral issues > general education interventions); *cf.* Colvin v. Lowndes Cnty. Sch. Dist., 144 F. Supp. 2d 504 (N.D. Miss. 1999) (parental request for testing plus academic performance, including general ed interventions). For a decision inconclusively in the parents' favor, see E.S. v. Konocti Unified Sch. Dist., 55 IDELR ¶ 226 (N.D. Cal. 2010) (denying dismissal of parents' appeal of hearing officer's decision rejecting their child find claim); *cf.* Doe v. Dublin City Sch. Dist., 453 F. App'x 606 (6th Cir. 2011) (interim order for evaluation but ultimate dismissal for failure to exhaust impartial hearing process); Liberty Cnty. Sch. Sys. v. John A., 33 IDELR ¶ 33 (S.D. Ga. 2000) (hearing officer found child find violation but this court's decision was limited to the stay-put during the appeal).

[3] D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012) ("hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years" and proactive general education interventions during reasonable period after intervening evaluation determining non-eligibility); Richard S. v. Wissahickon Sch. Dist., 334 F. App'x 508 (3d Cir. 2009) (reasonably "perceived by professional educators to be an average student who was making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences, and a failure to complete homework"); Bd. of Educ. of Fayette Cnty. v. L.M., 478 F.3d 307 (6th Cir. 2007) (early grades plus various general education interventions); Hupp v. Switzerland Local Sch. Dist., 912 F. Supp. 2d 572 (N.D. Ohio 2012) (teacher provided interventions that were successful); Daniel P. v. Downingtown Area Sch. Dist., 57 IDELR ¶ 224 (E.D. Pa. 2011) (grades and progress opinion of teacher providing general education interventions); Jackson v. Nw. Local Sch. Dist., 55 IDELR ¶ 71, *adopted*, 55 IDELR ¶ 104 (S.D. Ohio 2010) (first of two points in time: satisfactory progress with general education interventions and related services); Strock v. Indep. Sch. Dist. No. 281, 49 IDELR ¶ 273 (D. Minn. 2008) (standardized, including NCLB, test scores and lack of motivation—dicta that "[c]hildren having ADHD who graduate with no special education or any § 504 accommodation are commonplace"); Daniel S. v. Council Rock Sch. Dist., 49 IDELR ¶ 9 (E.D. Pa. 2007) (defensive evaluations and "pink flag" but not until private diagnosis); Sanders v. DeKalb Cnty. Cent. Unified Sch. Dist., 26 IDELR 257 (N.D. Ind. 1996) (symptoms does not mean diagnosis and no causal suspicion of need for special ed, although odd additional reason that parents have initial responsibility to identify potential problem and request assistance); *cf.* D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887 (5th Cir. 2012) (no child find violation when student was not eligible).

[4] El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918 (W.D. Tex. 2008) (13 months between parental request and district's offer was too long, citing other, non-ADHD cases and circumstances); *cf.* W.B. v. Matula, 67 F.2d 484 (3d Cir. 1995) (denying district's motion for summary judgment summary judgment, thus preserving for further proceedings whether six months between reasonably suspecting eligibility and referral for an evaluation was too long).

[5] 20 U.S.C. §§ 1414(a)–(c); 34 C.F.R. §§ 300.301–300.304. For the overlapping provision with child find, see *id*. § 300.304(c)(4) (obligation to assess in all areas of suspected disability). For the overlapping provision with eligibility, see *id*. § 300.305 (evaluation to determine eligibility or continued eligibility). For a comprehensive overview of the case law and agency interpretations, see Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, __ EDUC. L. REP. __ (forthcoming 2013).

[6] The IDEA requires the IEP team to "consider" (i.e., give due weight) to any IEEs that the parent shares with the team. See, e.g., K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795 (8th Cir. 2011); T.S. v. Bd. of Educ., 10 F.3d 87 (2d Cir. 1993) (interpreting and applying 34 C.F.R. 300.502(c)(1)). For the separable issue of when the district must pay for the IEEs, see, e.g., Perry A. Zirkel, *Independent Educational Evaluation Reimbursement under the IDEA: An Update*, 47 ELA NOTES 16 (Fall 2012) (available from the Education Law Association).

[7] See *supra* note 5 and *infra* notes 9-10. For the additional identification and application of such examples, including NCLB testing and motivational considerations, see *infra* notes 24-25.

[8] See *infra* note 10.

[9] D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012) (various tests that "covered discrepant skill sets and probed for indicia of varying disabilities" regardless of lack of FBA or subsequent evaluation finding eligibility); P.R. v. Woodmore Local Sch. Dist., 46 IDELR ¶ 134 (N.D. Ohio 2006), *aff'd on other grounds*, 256 F. App'x 751 (6th Cir. 2007) (various sources and overlapping with eligibility/IEE issues); *cf*. Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378 (5th Cir. 2007) (variety of sources as part of eligibility issue). Contrary to the expectation of school psychologists and special education experts, the case law rarely addresses the appropriateness, including validity, of the assessment measures. For one of the few and rather limited exceptions, see Breanne C. v. S. York Cnty. Sch. Dist., 732 F.Supp.2d 474 (M.D. Pa. 2010) (partial reliance on inadequacy of district's assessment tools).

[10] G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455 (E.D. Pa. 2011) (school psychologist's over-emphasis on cognitive indicators); D.B. v. Bedford Cnty. Sch. Bd., 708 F. Supp. 2d 564 (W.D. Va. 2010) (failure to differentiate SLD from other ID and OHI); Compton Unified Sch. Dist. v. A.F., 54 IDELR ¶ 225 (C.D. Cal. 2010) (failure to evaluate all areas of suspected disability); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008) (failure to review "relevant" and "existing" evaluation information, including medical and historical data). For mixed results, see W.H. v. Clovis Unified Sch. Dist., 52 IDELR ¶ 258 (E.D. Cal. 2009).

[11] 20 U.S.C. § 1402(3)(A); 34 C.F.R. §§ 300.8(a) and 300.8(c). For SLD, additional provisions are *id*. §§ 300.307-300.311. For ADHD, OSEP has clarified that the child may be gifted (or otherwise have "high cognition") and still eligible if meeting the criteria for IDEA eligibility. Letter to Anonymous, 55 IDELR ¶ 172 (OSEP 2010).

[12] The IDEA regulations, starting in 1999, made the fit all the more clear by not only adding ADHD to the list of illustrative chronic and acute health conditions, but also clarifying that limited alertness includes "a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment." *Id*. § 300.8(c)(9).

[13] The IDEA allows other "qualified personnel other than a licensed physician" to make this diagnosis for purposes of OHI eligibility (as distinct from medical purposes). See, e.g., Letter to Anonymous, 34 IDELR ¶ 35 (OSEP 2000); Letter to Williams, 20 IDELR 1210 (OSEP/OCR 1993); Letter to Parker, 18 IDELR 963 (OSEP 1991); *cf*. Questions and Answers on Individualized Educational Programs, Evaluations, and Reevaluations under the IDEA, 111 LRP 63322 (OSERS 2011) (no requirement for a medical diagnosis under the IDEA).

[14] Leslie B. v. Winnacunnet Cooperative Sch. Dist., 28 IDELR 271 (D.N.H. 1998) (state law); M.J.C. v. Special Sch. Dist. No. 1, 58 IDELR ¶ 288 (D. Minn. 2012) (local policy or practice). In any event, the diagnosis shall be at no cost to the parents. See OSEP policy letters, *supra* note 13. However, reflecting the overlap of the three succeeding steps, the trigger is the child find "reason to suspect"; OSEP policy beyond but including ADHD has long been that a district may deny a parental request for an evaluation upon proper notice (unless state law requires evaluation upon demand) and, without parental request, does not need a diagnosis of ADHD where there is no reason to suspect eligibility. See, e.g., Memorandum to State

Directors of Special Education, 56 IDELR ¶ 50 (OSEP 2011).

[15] 20 U.S.C. § 1412(a)(25). For similar OSEP policy before this 2004 amendment to the IDEA, see Letter to Hoekstra, 34 IDELR ¶ 204 (OSEP 2000).

[16] For a comprehensive analysis of the case law concerning SLD eligibility, see PERRY A. ZIRKEL, THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY (2006) (published by CEC); Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Latest Case Law*, 41 *COMMUNIQUÉ* 10 (Jan./Feb. 2013).

[17] The applicable approach primarily depends on state law. See, e.g., Perry A. Zirkel & Lisa B. Thomas, *State Requirements and Recommendations for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60 (Sept./Oct. 2010); Perry A. Zirkel & Lisa B. Thomas, *State Laws for RTI: An Updated Snapshot*, 42 TEACHING EXCEPTIONAL CHILD. 56 (Jan./Feb. 2010). In the majority of states, the state permits both approaches, leaving the choice to each school district. *Id*.

[18] The limited case law tends to focus on other criteria. See, e.g., Breanne C. v. S. York Cnty. Sch. Dist., 732 F.Supp.2d 474 (M.D. Pa. 2010) (deficiencies in the evaluation as compare with an IEE); D.B. v. Bedford Cnty. Sch. Bd., 708 F. Supp. 2d 564 (W.D. Va. 2010) (deficiency evaluation in terms of differentiating SLD from other classifications). For an inconclusive decision, see Dep't of Educ. State of Hawaii v. Patrick P., 60 IDELR § 6 (D. Haw. 2010) (concluding that district's appeal of hearing officer's SLD eligibility decision was permissible).

[19] The limited case law tends to focus on criteria subsumed here under item C-2, the second prong of eligibility. See, e.g., C.M. v. Dep't of Educ., State of Hawaii, 476 F. App'x 674 (9th Cir. 2012) (achieved commensurate with age/ability); C.B. v. Dep't of Educ. of City of New York, 322 F. App'x 20 (2d Cir. 2009) (lack of adverse impact on educational performance); Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099 (9th Cir. 2007) (former state law criterion of correctable "through other regular or categorical services offered within the regular instructional program").

[20] See, e.g., Perry A. Zirkel, *Checklist for Identifying Students Eligible under the IDEA Classification of Emotional Disturbance (ED): An Update*, 286 EDUC. L. REP. 7 (2013).

[21] Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375 (E.D. Pa. 2012) (sufficient duration).

[22] P.C. v. Oceanside Union Free Sch. Dist., 818 F. Supp. 2d 516 (E.D.N.Y. 2011) (not meeting definition, especially in light of substance abuse); Brendan K. v. Easton Area Sch. Dist., 47 IDELR ¶ 249 (E.D. Pa. 2007) (not meeting definition, with ADHD addressed via medication and 504 plan).

[23] Although the bridging criterion of adverse effect on educational performance is expressly part of the classification criteria (except for SLD) and some courts regard it as a separable intermediate eligibility prong, it is subsumed herein under this second prong because the need for special education effectively provides the answer to the requisite extent of the adverse effect on educational performance. The cited court decisions vary in their foci, such as the scope of educational performance, but most uses as decisional factors the sources of data that practitioners associate with general v. special education.

[24] Hansen v. Republic R-III Sch. Dist., 632 F.3d 1024 (8th Cir. 2011) (tutor's testimony and high-stakes test w. and w/o medication, but mixed with ED eligibility based on bipolar disorder); Scarsdale Union Free Sch. Dist. v. R.C., 60 IDELR ¶ 195 (S.D.N.Y. 2013) (deference to review officer—IEEs > satisfactory performance with 504 plan); W.H. v. Clovis Unified Sch. Dist., 52 IDELR ¶ 258 (E.D. Cal. 2009) (OHI for written expression, but not SLD); State of Hawaii Dep't of Educ. v. Zachary B., 52 IDELR ¶ 213 (D. Haw. 2009) (various sources, including IEE and general education interventions, showing that lack of motivation was symptom of ADHD rather than separate cause); Chariho Reg'l Sch. Dist. v. C.P., 2009 WL 4015604 (D.R.I. Nov. 15, 2009) (deference to hearing officer's assessment including documented academic failures and disciplinary behavior); Williamson Cnty. Bd. of Educ. v. C.K., 52 IDELR ¶ 40 (M.D. Tenn. 2009) (SLD and OHI—deference to hearing officer's credibility determination in favor of parents' expert plus inconsistent academic performance despite above average final grades); M.P. v. Santa Monica Unified Sch. Dist., 633 F. Supp. 2d 1089 (C.D. Cal. 2008) (SLD and OHI—teachers as to what, which was lack of motivation, but parents' private neuropsychologist as to why, ADHD); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008) (performance prior to current private school environment); W. Chester Area Sch.

Dist. v. Bruce C., 194 F. Supp. 2d 417 (E.D. Pa. 2002) (child's potential and parental assistance > passing grades); Venus Indep. Sch. Dist. v. Daniel S., 36 IDELR ¶ 185 (N.D. Tex. 2002) (behavioral problems > above-average academic performance—OHI and ED); *cf.* Scarsdale Union Free Sch. Dist. v. R.C., 60 IDELR ¶ 195 (S.D.N.Y. 2013) (unspecified classification and other diagnoses too).

[25] C.M. v. Dep't of Educ., State of Hawaii, 476 F. App'x 674 (9th Cir. 2012) (satisfactory performance in general education with 504 plan); C.B. v. Dep't of Educ. of City of New York, 322 F. App'x 20 (2d Cir. 2009) (grades and test scores > opinion of psychiatrist and private school teacher); Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378 (5th Cir. 2007) (passing grades, NCLB test scores plus teachers' opinion > medical opinion plus other causes, such as substance abuse); Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099 (9th Cir. 2007) (deference to hearing officer's determination that student performed satisfactorily in general education with 504 plan); Chelsea D. v. Avon Grove Sch. Dist., 61 IDELR ¶ 161 (E.D. Pa. 2013) (average test scores, generally good grades, proficient classroom performance); G.H. v. Great Valley Sch. Dist., 61 IDELR ¶ 63 (E.D. Pa. 2013) (above-average grades, teachers' and counselor's opinion, and therapeutic needs based on outbursts at home > drop in isolated standardized test scores); Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282 (S.D.N.Y. 2011) (academic performance, not social and emotional problems in Second Circuit); M.P. v. N.E. Indep. Sch. Dist., 49 IDELR ¶ 37 (W.D. Tex. 2007) ("finds persuasive the testimony of [the child's] teachers, who observed his educational progress first-hand, and finds them more reliable and informative than much of the testimony from [the child's private] experts, who based their general opinions on limited information culled from isolated visits"); Strock v. Indep. Sch. Dist. No. 281, 49 IDELR ¶ 273 (D. Minn. 2008) (overlap with child find—standardized test scores and lack of motivation); Ashli v. State of Hawaii Dep't of Educ., 47 IDELR ¶ 65 (D. Haw. 2007) (average, non-discrepant performance with general education interventions, here in an intervention plan); P.R. v. Woodmore Local Sch. Dist., 46 IDELR ¶ 134 (N.D. Ohio 2006) (various sources including student's grades and IEE); Austin Indep. Sch. Dist. v. Robert M., 168 F. Supp. 2d 635 (W.D. Tex. 2001), *aff'd mem.*, 54 F. App'x 413 (5th Cir. 2002) (NCLB test score in contrast with grades due to lack of motivation); Lyons v. Smith, 829 F. Supp. 414 (D.D.C. 1993) (deferring to hearing officer's determination based on test scores all in average or above-average range); *cf.* Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547 (N.D. Ohio 2009) (not OHI, but properly classified as ED for purpose of FAPE and with role of ADHD unclear compared with Asperger disorder); Richland Sch. Dist. v. Thomas P., 32 IDELR ¶ 233 (W.D. Wis. 2000) (various indicators including behavior and concentration but manifestation determination case for student with SLD with belated diagnoses of ADHD and dysthymia—close case that was arguably child find). In cases beyond ADHD eligibility under the IDEA, the Seventh Circuit has been emphatic on deference to district educators rather than private experts more generally. Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 640-41 (7th Cir. 2010); Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057-58 (7th Cir. 1997).

[26] 34 C.F.R. §§ 104.32 (collective—identify, locate, and notify resident children with disabilities not receiving public education) and 104.35-104.36 (individual—obligation to evaluate "any person who, because of [disability], needs or are *believed to need* special education or related services"). OCR has made clear in its policy interpretations that the trigger for child find—parallel to that under the IDEA for its different definition for eligibility—is reason to suspect, not parental suspicion or demand. See, e.g., Letter to Mentink, 19 IDELR 1127 (OCR 1993); OCR Memorandum, 19 IDELR 876 (OCR 1993). The final qualifier, "need for special education or related services," squares with the substantive side of the definition of FAPE in the § 504 regulations (34 C.F.R. § 104.33(b)) but poses a potential glitch with the procedural side, which would seem to require evaluation of students who, depending on the effect of mitigating measures or remission, do not need FAPE but are still eligible as having a disability. See Dear Colleague Letter, 58 IDELR ¶ 79 (OCR 2012) (Q/A 9 – ADHD example; Q/A 10 – reasonable modifications; and Q/A 11 – nondiscrimination protection).

[27] Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375 (E.D. Pa. 2012) (psychiatric hospitalization plus multiple diagnoses, including ADHD); *cf.* Brown v. Sch. Dist. of Philadelphia, 59 IDELR ¶ 130 (E.D. Pa. 2012) (inconclusive—possible liability preserved for further proceedings); T.J.W v. Dothan City Sch. Dist., 26 IDELR 999 (M.D. Ala. 1997) (inconclusive—possible liability preserved for further proceedings, with clarification that "without evidence that she had been adequately trained as to the

applicable standards for referral, a reasonable fact finder could conclude that her decision that the Plaintiff was not in need of special services so as to require a referral was a gross departure from professional standards, given the evidence that she suspected that the Plaintiff had ADD").

[28] 34 C.F.R. § 104.35(b)-(c) (including valid instruments, varied sources, and knowledgeable team).

[29] 29 U.S.C. § 705(20)(B); 34 C.F.R. § 104.3(j). For the separable issue of whether the child is entitled to special education, see Lyons v. Smith, 829 F. Supp. 414 (D.D.C. 1993) (only if to remedy discrimination in terms of commensurate opportunity standard).

[30] Via joint issuance of the policy interpretation regarding "qualified personnel other than a licensed physician" (Letter to Williams, *supra* note 13), OCR applied it to Section 504 eligibility determinations. Letter to Williams, 20 IDELR 1210 (OSEP/OCR 1994).

[31] For practical overviews, see, e.g., Perry A. Zirkel, *The ADAA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC. LEADERSHIP 3 (Mar. 2009); Perry A. Zirkel, *New Section 504 Student Eligibility Standards*, 41 TEACHING EXCEPTIONAL CHILD. 68 (Mar./Apr.. 2009). For a comprehensive two-volume reference, see PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (2011 plus annual supplements) (LRP Publications).

[32] Weidow v. Scranton Sch. Dist., 460 F. App'x 181 (3d Cir. 2012) (bipolar disorder, but not substantial).

[33] T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997) (inconclusive as to whether it was substantial).

[34] The reason for the brackets is that the case law to date arose before the more relaxed standards of the ADAAA, and the single exception did not mention the changes. Bercovitch v. Baldwin Sch., 133 F.3d 141 (1st Cir. 1999) (learning—"academic success did not fall below that of the average student his age"); T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997) (learning—average student in general population, not those with same intellectual potential, as the standard—passing grades as a major, not sole factor); *cf*. Rademaker v. Blair, 55 IDELR ¶ 286 (C.D. Ill. 2010) (post-ADAAA: learning—passing grades comparable to average student); Tesmer v. Colorado High Sch. Athletic Ass'n, 140 P.2d 249 (Colo. Ct. App. 2006) (preliminary injunction under corresponding state disability-discrimination law). For pre-ADAAA decisions that were inconclusive and, thus, does not fit on either the Yes or No side, see Centennial Sch. Dist. v. Phil L., 799 F. Supp. 2d 473 (E.D. Pa. 2011); Axelrod v. Phillips Acad., 46 F. Supp. 2d 72 (D. Mass. 1999) 1999), *further proceedings*, 74 F. Supp. 2d 106 (D. Mass. 1999); *cf*. Michael M. v. Bd. of Educ. of Evanston Twp. 53 IDELR ¶ 21 (N.D. Ill. 2009) (started pre-ADAAA but continued when district notified parents that it would determine eligibility under ADAAA but had not done so yet).